(16)

No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Oregon

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS® AND THE OREGON ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER FLORENCE DOLAN

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Pursuant to Supreme Court Rule 37, the National Association of Realtors®* and the Oregon Association of Realtors® respectfully file this amicus curiae brief in support of petitioner, Florence Dolan and urge this Court to reverse the decision of the Oregon Supreme Court. Counsel for petitioner and respondent have consented to the filing of this brief and such consent has been lodged with the Clerk of this Court.

IDENTITY AND INTEREST OF AMICUS CURIAE

The National Association of Realtors® (hereinafter NAR) is a not-for-profit professional association comprised of approximately 726,000 persons engaged in all phases of the real estate business. NAR was created in 1908 to promote and encourage the highest and best use of land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR includes among its members real estate brokers, managers, appraisers, counselors, and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in matters of concern to property owners for over three

*The term "Realtor®" is a federally registered collective membership mark used to identify numbers of NAR who subscribe to NAR's strict code of ethics.

quarters of this century. Of the issues which have concerned NAR, few, if any, have been more fundamental or of greater importance than the preservation of private property rights as established by the United States Constitution. This commitment to private property rights is the cornerstone of NAR, for without such rights there would be no ownership, development, transfer, or enjoyment of real estate.

At stake in this case is the vitality of the protection afforded property owners by the Fifth and Fourteenth Amendments of the United States Constitution against the uncompensated taking of property by the imposition of regulations which fail to substantially advance a legitimate government interest. The decision below, unless remedied by this Court, will substantially, if not entirely, undermine the viability of the protection provided by those Constitutional provisions and this Court's precedents interpreting them.

NAR is well-positioned to recognize the gravity of this threat. NAR's members, who are involved in more than 80% of all real property resale transactions, span the nation. The comprehensive involvement of NAR and its members in land development, investment, and sale provides NAR with a clear understanding of the impact regulatory actions such as the one at issue here have on the enjoyment and exercise of constitutionally protected property rights.

Similarly, the Oregon Association of Realtors®, a state-level affiliate of NAR (hereinafter OAR) is a nonprofit, professional association of commercial and residential real estate professionals in the state of Oregon

with approximately 12,000 members. OAR and its members have been involved in litigation at various times in support of individuals' rights in property and are deeply concerned about the extent to which government may legally restrict the use of land. Real property is the substance of its members' business and "[t]he substantial value of property lies in its use." *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 409, 348 P.2d 664, 669 (1960). Conditions imposed on use, therefore, influence the marketability of land.

Members of OAR advise the public on the attributes of land affecting its value. The Oregon Supreme Court's decision in this case allows government to attach conditions to otherwise permitted uses of property based on speculative impacts the government might imagine could result from proposed uses of property. The value of property depends on a number of interdependent factors, among the most significant of which is the extent to which government can impose conditions, especially exactions, on uses. If conditions can be imposed on the basis of conjecture and without proof as allowed by the Oregon Supreme Court, property values will become more unstable than what naturally occurs in the market and will leave people with greater uncertainty and risk. The OAR's concern and experience with these issues will amplify the argument presented by the Petitioner in this case.

The purpose of OAR and NAR in submitting this brief amicus curiae is to add the voices of the hundreds of thousands of NAR and OAR members and the millions of American property owners they serve to the chorus of

others concerned with the dangerously limiting construction of the Fifth Amendment's guarantee of private property rights articulated by the court below.

SUMMARY OF ARGUMENT

The Constitution's protection of property in the Fifth Amendment is far more than an inconvenience to government regulators. Its purpose is to make sure that individuals are not saddled with more than their fair share of the burdens of government. If an individual is singled out to contribute more than what is demanded through the taxing power, it is the government's obligation to prove that it is taking no more than is necessary to protect the public from burdens caused by that individual.

What is demanded must alleviate real burdens – not ones which are merely hypothetical, conjectural, speculative or imagined. And if the public burden to be alleviated is caused by many parties, each individual burden must be proportional to the burden caused by each individual. Causation of public harm and the cost of redress are natural parameters for land use exactions.

Finally, the courts must ensure that government proves a real, rather than a theoretical connection between the use and the condition. Such proof requires evidence and a nonprejudicial trier of fact. Otherwise, the strong public desire to make the few pay for the benefits to the many will become the order of the day.

ARGUMENT

I

CONDITIONS IMPOSED ON PERMISSION TO USE PRIVATELY OWNED LAND CAN TAKE FROM THE OWNER ONLY THAT WHICH MITIGATES ACTUAL BURDENS TO THE PUBLIC CAUSED BY THE PROPOSED USE

The central question of this case concerns what limits the Constitution places on conditions attached to permits to use privately owned property. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court reviewed a permit to replace an existing beach front dwelling with a larger home on the condition that the owners dedicate an easement for public access along their privately owned beach. This Court concluded that such a condition violated the Takings Clause of ~~the~~ Fifth and Fourteenth Amendments because the condition failed to substantially advance a legitimate government interest. *Nollan*, 483 U.S. at 835 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Recognizing that requiring the easement outright would have constituted a taking of property, the Court in *Nollan* considered whether a taking occurred when such a dedication was required only as a condition to a land-use permit – the identical question at issue in the present case.

In *Nollan*, this Court developed a two-step approach. First, the government must have the authority to deny the permit altogether without otherwise causing a taking of property. 483 U.S. at 835-36. Then, and only then, can the government lift the ban and grant the permit subject to a "condition which serves the same legitimate police-power purpose as a refusal to issue the permit." 483 U.S.

at 836. In the case at hand, the Oregon Supreme Court recognized that conditions are allowed only as substitutes for outright prohibition. Appendix, A-15.[1] The question in this case, however, is how closely a court must scrutinize a condition to ascertain that it in fact takes no more than is necessary to satisfy the legitimate interest in protecting the public from adverse consequences in the use of property – the interest which must be sufficient to stand as the basis for an outright prohibition.

This Court explained the problem with allowing government to condition property usage on exactions which are not directly tied to an impact which would justify an absolute prohibition.

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. . . . The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.

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[1] Although the Oregon Supreme Court recognized the condition is justified only if a refusal would be justified, it never evaluated whether the City of Tigard could have denied the Dolans' permit on the basis that the larger building would have created too great a burden on bicycle traffic or storm water drainage or recreational "greenway" needs.

Id. at 837. Using the ability to ban a particular land use to acquire something else results in a "leveraging of the police power" by adopting unnecessarily strict land use controls for the purpose of bargaining them away for something the government really wants, but cannot take directly without paying compensation. *Nollan,* 483 U.S. 837 n.5. The Court was and still should be concerned about the use of regulatory power to obtain public benefits without payment of compensation. Here the City will obtain a bicycle path, land for a storm drainage channel and a greenway for public recreation – improvements which the City has failed to prove are necessitated by Mrs. Dolan's new facility and which benefit far more than Mrs. Dolan or the customers or employees of the business in her building.

Nevertheless, the Oregon Supreme Court focused on what constitutes the necessary relationship between Mrs. Dolan's proposal and the conditions. Courts throughout the nation have developed a variety of tests for evaluating the relationship between conditions imposed on private land use and adverse impacts on legitimate public interests caused by such use. Among them are the rational nexus test,[2] the reasonable relationship test,[3] and the

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[2] *Jordan v. Village of Menomonee Falls,* 137 N.W.2d 442 (Wis. 1965).

[3] *Associated Homebuilders v. City of Walnut Creek,* 484 P.2d 606 (Cal. 1971).

specifically and uniquely attributable test.[4] Commentators have recommended still others.[5]

A focus on the level of scrutiny has the potential of missing the point. When employing the highest level of scrutiny – the compelling state interest test – the court weighs the value or importance of the government interest against the individual interest at stake. Here, the government interest need not be of the highest order[6]; it need only be one which is sufficient to deny the proposal without otherwise taking the property. Yet, the courts' job in reviewing regulations of property is far more than trying to imagine a rational basis as under the Due Process Clause. Nor should the court deferentially accept without justification and proof that the proposal actually generates the need for the restriction. The duty of the court is to make sure when the government asserts a need to take something from a specific property owner that the government **proves** it is taking no more than the property owner is responsible for providing to the public. Unlike the rational basis test of the Due Process Clause, hypotheticals, even though they may be rational or "imaginable," will not suffice. The regulation must actually solve a public burden which is demonstrably caused by the proposed use of the property, and no more.

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[4] *Pioneer Trust & Savings Bank v. Village of Mt. Prospect*, 176 N.E.2d 799 (Ill. 1961).

[5] *See, e.g.*, J. Delaney, L. Gordon & K. Hess, *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 Law & Contemp. Probs. 139 (1987).

[6] The Court in *Nollan* recognized that "a broad range of governmental purposes and regulations satisfies these requirements." 483 U.S. at 834-35.

Regardless of whether any of the lower courts' tests or some completely new phrase is employed, the name of the test is not nearly as important as how the test actually operates and how vigorously courts will enforce the legitimate application of that test. Whatever language is chosen, courts must be the guardians against Justice Holmes, warning:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

A. The Policies Underlying the Fifth Amendment Require Equivalence Between what the Government Takes and What the Government Gives in Return

In *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1892), the Court explained the Fifth Amendment's concern with ensuring that some citizens are not unevenly charged with the burdens of government.

> [T]here is a natural equity which commends [the right of just compensation] to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Id. at 325.

From this early discussion of the Just Compensation Clause it is clear that its purpose is based on preventing the public from loading upon one individual more than his or her just share of the burdens of government. Mrs. Dolan has been required to surrender far more than other citizens of Tigard – 10% of her land and the entire cost of actually constructing the bicycle path on her property. The only justification for requiring her to contribute more than any other taxpayer is if her proposal creates its own burdens on the city which she and only she should be responsible for resolving.[7] What was taken without compensation from Mrs. Dolan must be equivalent to the burdens her larger building is placing on society – that is burdens which are "more and different from" burdens caused by other members of society.

This Court went further in explaining that the entire notion of "just compensation" in the Fifth Amendment is "equivalence."

> The noun "compensation," standing by itself, carries the idea of an equivalent. . . . So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural

[7] Requiring property owners to pay for burdens to the public caused by a peculiar use of land is neither inappropriate, nor new. This Court has, for example, repeatedly allowed government to place the responsibility for creating railroad grade crossings on the railroads. "Having brought about the problem, the railroads are in no position to complain because their share of the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements." *Atchison, Topeka & Santa Fe Railway v. Public Utility Commission*, 346 U.S. 346, 352 (1953).

> import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. This excludes the taking into account, as an element of compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

148 U.S. at 326.

The problem with the Oregon Supreme Court's approach is its highly superficial review of the City's proffered "reasonable relationship" between the exaction and the construction of a larger building proposed by Mrs. Dolan. The scope of review employed by the court neglected to ensure that Mrs. Dolan bear only the burdens of her own making. The Fifth Amendment insists

that citizens be treated equally. Only those creating specific public burdens may be singled out to pay for addressing those burdens and only to the extent of their responsibility.

The Oregon Supreme Court ruled that the "reasonably related" test applied because it was used by this Court in *Nollan* when it accepted the California Coastal Commission's claim that the condition need only be "reasonably related." 483 U.S. at 838. However, this Court did not rule a "reasonably related" test was the standard. The Court accepted such language only "for purposes of discussion" because the California Coastal Commission was unable to prove that the condition was even reasonably related to any public harm. 483 U.S. at 838.

It was at this point this Court cited a list of cases indicating that conditions on the use of property which are not reasonably related to a public burden which would justify a total prohibition constitute a taking of property. The first in the list was *Parks v. Watson*, 716 F.2d 646, 651-53 (9th Cir. 1983), *cited in Nollan*, 483 U.S. at 839. The Oregon Supreme Court relied heavily on the *Nollan* decision's citation of *Parks*. Appendix A-12.

However, the Oregon Supreme Court failed to realize that *Parks*, like *Nollan*, involved a condition which had no connection to the proposal and, therefore, could not survive even the most "untailored" standards. *Nollan*, 483 U.S. at 838. In *Parks*, the property owner was told that the city would vacate platted streets only if the owner gave to the city his geothermal wells. 716 F.2d at 649. The Ninth Circuit could not imagine any connection between street vacation and the required give-away of private

geothermal wells. Just because the conditions in *Parks* and *Nollan* could not stand the most generous level of scrutiny does not mean the lowest level is the one that applies.

The Oregon Supreme Court also claimed that "[i]n *Nollan*, the Court did not purport to abandon the generally recognized 'reasonably related, test and, in fact, noted that its approach was 'consistent with the approach taken by every other court that has considered the question, with the exception of California.' " Appendix A-13 (quoting *Nollan*, 483 U.S. at 839).

The problem, however, is that this Court could not have been citing that list of cases for approval of the "reasonably related" test for several reasons. First, that test is not so "generally recognized" for not all the cases in the list used the "reasonably related" test. In fact, included in the list is *Pioneer Trust and Savings Bank v. Mt. Prospect*, 176 N.E.2d 799, 802 (1961), which developed a test considered to be the strictest: the specifically and uniquely attributable test. Second, at the time of *Nollan*, California was one of the states that purported to use the "reasonably related test." *See Associated Homebuilders v. City of Walnut Creek*, 484 P.2d 606 (Cal. 1971). So expressly excluding California from the list made no sense if this Court were placing its stamp of approval on the "reasonably related" test. What all those state judiciaries, except California, agreed upon was that exactions which do not "remedy any additional [burden] caused by the construction of the Nollans' new house . . . cannot be treated as an exercise of its land-use power." 483 U.S. at 838-39.

In short, this Court has never adopted the "reasonably related" test as the standard for land use conditions. As illustrated by the inequitable and harsh, unjust result which the Oregon Supreme Court has permitted to stand here by its application of that test, it fails to ensure that individuals are not charged with disproportionate costs of the business of government or of achieving the strong public desire to improve the public condition.

B. Conditions on Permission to Use Privately Owned Land Must Alleviate Real Burdens – Not Ones Which are Merely Hypothetical or Imagined

Nollan made clear that in order for a condition to be imposed on the use of private property, the government must do more than merely assert that the condition is legitimate in a conclusory fashion. While the dissent in *Nollan* argued that the Coastal Commission could easily demonstrate a connection between the building of a larger home and the easement exaction, the majority rejected that claim by stating the Fifth Amendment requires more than merely reciting talismanic findings. Specifically, this Court stated:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction,

> since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective.

Nollan, 483 U.S. at 841 (emphasis in original).

Also, the Court's discussion and contrast of the Takings Clause with the rational basis test of the Due Process Clause mandates that courts not attempt to justify conditions to alleviate hypothetical burdens or ones which may be "assumed."

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved. Agins v. City of Tiburon, 447 US 255, 260, . . . not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (quoting 483 U.S. at 843 (Brennan, J., dissenting) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981))). This Court required more than the speculative, hypothetical, or assumable justification often allowed under the rational basis test of substantive due process and specifically rejected regulatory purposes which appeared to be "made up." 483 U.S. at 839 n.6.

This is where the Oregon Supreme Court took an unmistakable departure from this Court's decision in *Nollan*. The Oregon court relied on hypothetical or

"assumable" burdens to supposedly justify the demand that Mrs. Dolan give up some of her property. These are the City's critical "findings."

> It is reasonable to **assume** that customers and employees of the future uses of this site **could** utilize a pedestrian/bicycle pathway adjacent to this development for their transportational and **recreational needs.**
>
> In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to **expect** that some of the users of the bicycle parking provided by the site plan will use the pathway adjacent to Fanno Creek if it is constructed.

Appendix G-24 (emphasis added).[8]

The City did not prove anything about the Dolans' proposal. (In fact, it placed the burden on the Dolans to prove that the taking of property was unconstitutional. Appendix G at G-7, G40.) Nevertheless, the City merely concluded that it could assume that some employees or customers of the plumbing business might use the pathway. Of course, they may also visit other facilities operated by the City of Tigard as well. Under the Oregon

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[8] It is wrong to conclude that the pathway is merely completing the owner's plans to promote bicycle traffic. Bicycle racks are required by the city code. Appendix G-21 ("The proposed development would be provided with adequate bicycle parking as required by Code Section 18.106.020P which requires one bicycle rack parking space for every 15 auto spaces, or portion thereof").

Supreme Court's analysis there is no reason Mrs. Dolan or people like her could not be singled out to provide a wide array of resources to potential customers of the electrical and plumbing supply store.

As discussed above, this Court's contrast of the Taking Clause to the rational basis test of the Due Process Clause belies the notion the level of review is so minimal as to allow "assumed" impacts to suffice. Yet, the Oregon court's reliance on a "reasonably related" test, and the superficial, deferential manner in which the court applied that test, in all practicality operates more like the rational basis test of the Due Process Clause than anything else.

The City of Tigard's ordinances indicate that all new development must contribute to the bicycle path and the greenway and the storm drainage if the owner happens to own property in the path of these proposed improvements. The City code only applies to land which is in or adjacent to floodplain. *See* Appendix K (Tigard Community Development Code, section 18.120.180) and Appendix J (policies indicating the same). Therefore, if new development occurs on property the City has no interest in acquiring, the new development has nothing to dedicate and is off the hook regardless of its impact on bicycle traffic or storm water runoff. A bicycle shop – an obvious generator of bicycle traffic – does not need to dedicate land for the creation of bicycle paths if the shop's property is not located along the proposed pathway. Proposals which may equally increase the impervious surface area but do not include land in the floodplain are not subject to the conditions imposed on Mrs. Dolan, even though the impacts, if any, are identical.

This Court in *Nollan* warned about such abuses.

> If the Nollan's were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Nollan, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

The Oregon Supreme Court has allowed the City of Tigard to force Mrs. Dolan to give her property because it has marked it out as desirable for a municipal improvement without any proof that she has contributed to the public need for these improvements more than any other Tigard landowner.

Moreover, the Constitutional analysis should not focus on a theoretical "connection" between the development and the condition. It hinges on **causation.** Mrs. Dolan is responsible only for the damage or burdens she causes. And as causation of harms becomes diffuse and difficult to assess, there is a longstanding solution to meeting public burdens not created by parties who can be fairly charged with paying for the burdens they inflict: taxation. That individuals must pay only for the harms they are distinctly responsible for is an equitable principle that is part and parcel of the Fifth Amendment.

C. Conditions Imposed on Permission to Use Privately Owned Land Must be Proportional to the Burdens to the Public Caused by the Use

When it is appropriately determined that a particular land use could be denied because of its deleterious impact on the general welfare, a condition to alleviate the impact as a prerequisite to lifting the prohibition can be said to be sufficiently related to burdens **caused by** the proposed use only if the use is restricted in a manner which is proportional to the impact caused by the private landowner. While Mrs. Dolan's proposed larger building may have had some burden on the City's storm water drainage system, she must not be saddled with contributing more than her fair share – that is paying a greater share of the system than other members of the community. If she is required to pay more than her fair share, she would be – as one court has put it – the victim of government-sponsored "grand theft."

> While in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create – i. e., greater needs for municipal services and facilities –, the possibility of arbitrariness and unfairness in their application is nonetheless substantial: A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.

Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976).

Also prior to *Nollan*, the New Jersey Supreme Court recognized that land use exactions have the potential to be abused by imposing on the owner of private land more than the cost of alleviating the burden caused by the land use in order to subsidize benefits to the general public. "It would be impermissible to saddle the developer with the full cost where other property owners receive a special benefit from the improvement." *Divan Builders, Inc. v. Planning Board of the Township of Wayne*, 334 A.2d 30, 39 (N.J. 1975). This, of course, complements the principle of equivalence that the landowner pays her fair share and society pays its share. "To do [otherwise] would result in patent discrimination in the treatment afforded the subdivision property as contrasted with the other properties specially benefited by the improvement." *Id.* at 40.

Unfortunately, Mrs. Dolan's property lies in the path of proposed government improvements. That was the only reason the ordinance even applied to her. However, if the bicycle path or storm drainage channel is ever completed without all other property owners having given up their land when applying for a new land use permit, that portion of the path and channel can be acquired only by eminent domain. Hence, Mrs. Dolan must suffer the indignity of knowing that her neighbors will be paid for their land; she was required to hand hers over to the City.

There is nothing in the City's "findings" to guarantee proportionality or even to quantify the increased need for bicycle paths occasioned by increasing the plumbing store's size, if any need will occur at all. As noted by dissenting Justice Peterson, it appears that the City is more concerned about having an uninterrupted pathway

than with making sure that those who create the "need" for the pathway, pay for it. Appendix A-23. A similar concern was raised and rejected in *Nollan*.

> "Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decision. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment." App. 68.
>
> That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization.

Nollan, 483 U.S. at 841. A comparison with the City of Tigard's "findings" and the argument by the California Coastal Commission reveals they are essentially the same.

The City's "findings" to support the dedication of the floodplain for the greenway fare no better.

> [T]he Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site thereby increasing the site's impervious area. The increased impervious surface would be **expected** to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a

> significant increase in stream flows after periods of precipitation.

Appendix G-37 (emphasis added).

As explained by dissenting Justice Peterson, there is no identification of how much storm water runoff will increase – perhaps a "thimbleful." Appendix A-26. Similarly, demanding the dedication of property within the 100-year floodplain for storm water purposes while at the same time requiring a dedication of land **outside** the 100-year floodplain for reconstruction of a flood control channel suggests that the City is interested in something other than storm drainage for the floodplain. Appendix at G-42. The real reason for requiring the dedication of land within the floodplain has nothing to do with storm water, but is candidly revealed in the City's ordinance itself:

> Fanno Creek Park . . . lies within the 100-year floodplain and immediately abuts the subject property along its southwestern property line. It is hoped that the entire park will eventually contain 35 acres. The dedication of the land within the 100-year floodplain and the eventual construction of a pathway in that area on the subject property is consistent with the City's park plans for the area.
>
> In the City's Master Plan for Fanno Creek Park, it is stated that Fanno Creek Park is intended to become the focal point for community, cultural, civic and recreational activities. A paved urban plaza, and amphitheater, an English water garden, pathways, a tea house, a man-made enlargement of the existing pond, as well as preserved natural areas are all components foreseen for this area.

Appendix G-42. While these plans for community recreational facilities may be legitimate, the plan to acquire the land by holding Mrs. Dolan's permit hostage is not.

In the present case, there was no proof advanced by the City that Mrs. Dolan was paying only her fair share of contributing to the city's greenway needs, bicycle paths and storm drainage system because there was no inquiry into proportionality. This Court should compel such an analysis of proportionality in order to verify that the condition or restriction imposed on property use is truly related to public burdens caused by such use, and no more. Without such proof, the City must pay for the private land it wishes to take to improve the public condition.

II

THE COURTS HAVE THE OBLIGATION TO ENSURE THAT GOVERNMENT PROVES THAT ITS CONDITIONS IMPOSED ON PERMISSION TO USE PRIVATELY OWNED PROPERTY ARE ONLY NECESSARY TO ADDRESS ACTUAL PUBLIC BURDENS CAUSED BY THE PROPOSED LAND USE

Also in *Monongahela* this Court emphasized the importance of the role of the courts to ensure that government does not take unfair advantage of private citizens.

> "The right of the legislature of the State, by law, to apply the property of the citizens to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent,

> or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of the courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.

148 U.S. at 327-28 (quoting *Isom v. Mississippi Central Railroad*, 36 Miss. 300, 315 (1858) (emphasis in original)).

Moreover, concern with the potential of government to overreach to serve its own financial advantage is not a relic of jurisprudence of an earlier century. Last month, this Court recognized that individuals should not be deprived of their real property unless there is first a judicial determination of the propriety of such a deprivation. *United States v. Good*, 62 U.S.L.W. 4013 (Dec. 13, 1993). The interest in judicial protection of property devoted to the plumbing supply business is no less than the real property of accused criminal defendants.

However, one of the inherent injustices facing Mrs. Dolan is that the Oregon land use system requires that she first present her objection that the government regulation causes a taking to the local government itself. ORS 197.835(2). Then, the exclusive review of the local government's decision is in the Land Use Board of Appeals (ORS 197.825(1)), with the potential of subsequent review at the Oregon Court of Appeals, and perhaps the Oregon Supreme Court. However, at each level, the scope of review is merely a look to see if the City of Tigard had

substantial evidence to support its decision. ORS 197.830(13)(b).

Inverse condemnation claims are not heard in Oregon trial courts until the Land Use Board of Appeals (LUBA) rules that a particular land use decision is unconstitutional or, in other words, that the government's finding of no taking does not have a scintilla of evidence to support it. *Dunn v. City of Redmond*, 735 P.2d 609, 612, 614 (Or. Sup. Ct. 1987) (LUBA jurisdiction is primary agency jurisdiction; compensation claims must wait until LUBA rules the land use decision is unconstitutional).

Naturally, the incentive for a local government to find that it did not violate the Constitution or that it owes no compensation to a landowner subjected to its regulation is quite high. The incentive is strengthened knowing that the Land Use Board of Appeals and further court review is powerless under Oregon law to rule against the local government if there is any evidence to support the government's findings.

Of course, this completely conflicts with this Court's concern expressed last month in *Good* and almost a century ago in *Monongahela* that government acting as judge and jury in questions of whether it must pay money and how much is owed cannot be tolerated.

Justice Peterson in his dissenting opinion assumed that the majority placed the burden of proving the constitutionality of the conditions on the government imposing them. Appendix A-18. However, reciting generalizations and assumptions is insufficient to prove causation in tort; it should receive less tolerance under the strictures of the Constitution.

The City of Tigard must do more than provide some evidence. It must prove a causal connection between Mrs. Dolan's larger building and the asserted need for the land it has demanded. And the Fifth Amendment must not tolerate government being the judge in a constitutional claim against it.

CONCLUSION

The hallmark of the Just Compensation Clause is justice. Equal treatment, proportionality, fairness are all wrapped up in that concept. Justice Holmes' warned in 1922 that the pressure to improve the public condition is strong. The Constitution must be enforced by courts who are not limited to superficial review of self-serving government declarations, but which are zealous guardians of the just principle that everyone pay their fair share and no one is saddled with an inordinant burden.

As government increasingly looks for new ways to provide public benefits, the insistence that those who seek a government permit satisfy the government's plans in order to obtain the permit will increase. As explained by Justice Beezer in his dissent in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1997 (1992), "legislators find it politically more palatable to exact payments from developers than to tax their constituents. The Takings Clause prohibits singling out developers to bear this burden." 941 F.2d at 876 (Beezer, J., dissenting).

If the Oregon Supreme Court decision in the present case remains, singling people out will become the order

of the day, for it is far easier to place public burdens on relatively small groups of people than it is to proportion burdens evenly throughout society. Amici curiae respectfully requests the Court to reverse the decision of the Oregon Supreme Court in this case.

Respectfully submitted,

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